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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street, N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, DC 20536

File: EAC 01 044 53891

Office: VERMONT SERVICE CENTER

Date: APR 10 2003

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the matter will be reopened. The appeal will be dismissed.

The petitioner is a corporation organized in the State of New York in August 1999 and is authorized to do business in New Jersey. It is engaged in the business of exporting computers, peripherals, and accessories. It seeks to employ the beneficiary as its president.

Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a managerial or executive capacity. The AAO affirmed this decision on appeal.

On motion, counsel for the petitioner states that the Bureau favorably considered the petitioner's L-1A petition for this petition and disagrees that this approval was in error. Counsel asserts that denial of this petition violates the concept of equal protection under the laws. Counsel also asserts that the beneficiary is managing the petitioner's marketing function.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -
- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will perform primarily managerial or executive duties for the petitioner.¹

Counsel's disagreement with the AAO on the issue of the previous approval of the petitioner's L-1 petition, and the AAO's comment that the previous approval was in error, is noted. However, counsel's contention that each case is adjudicated "on the feelings of the interpreter of the moment" is in error. Each case is adjudicated on its record. As previously stated in the AAO's decision, the Bureau is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., *Sussex Enqq. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert denied, 485 U.S. 1008 (1988); *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (BIA 1988). The record in this case does not support a conclusion that the beneficiary is eligible under this visa classification. Moreover, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Just as district court decisions do not bind the court of appeals, service center decisions do not control the AAO. The AAO is not bound to follow the rulings of service centers that are contradictory. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Counsel asserts that denial of this petition violates the equal protection laws. However, the AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equal protection so as to preclude a component part of the Bureau from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. See *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). This form of equitable relief is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted through the regulations at 8 C.F.R. § 103.1(f)(3)(iii). Accordingly, the

¹ The AAO will not repeat the petitioner's position descriptions for the beneficiary, the administrative/financial assistant, and the general clerk here, as the position descriptions have not been changed on motion.

Bureau has no authority to address the petitioner's equitable claim.

Counsel's assertion that the beneficiary is managing the petitioner's marketing function is also not persuasive. The petitioner fails to support the assertion with documentary evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner does not indicate that the administrative/financial assistant or the general clerk performs the marketing function. The beneficiary is responsible for finding suppliers and buyers for the petitioner's product. It appears from the petitioner's description of the beneficiary's duties that this service is not incidental to the beneficiary's duties but is her primary responsibility. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The beneficiary may function at a senior level within the organization but the petitioner has not established that the beneficiary primarily manages or directs the petitioner's marketing function rather than performing the function.

Counsel's repeated reference to two decisions made by the beneficiary, moving the company from one location to another and entering into a contract with a freight forwarding company, does not establish that the beneficiary is primarily performing executive or managerial duties. The two decisions made by the beneficiary do not contribute to an understanding of the beneficiary's daily duties relative to the ongoing operation of the organization. Again, the petitioner has not provided a description of the beneficiary's duties with sufficient supporting documentation to demonstrate that the beneficiary's assignment within the organization is primarily in a managerial or executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.